Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

LOE'S HIGHPORT, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HERBERT V. LARSON, JR.
Counsel of Record
700 Camp Street
New Orleans, LA 70130
(504) 528-9500
Attorney for Petitioner,
Loe's Highport, Inc.

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

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QUESTIONS PRESENTED

I.

Whether the due process clause of the Fifth Amendment, and *North Carolina v. Pearce*, 395 U.S. 711 (1969) permit a district court to utilize an "aggregate package" approach to resentencing following an appeal, to avoid a presumption of vindictiveness, or whether a district court must employ a "remainder aggregate," or "count by count" approach to avoid such a presumption.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS AND ORDERS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 9
CONCLUSION 15
APPENDIX
CIRCUIT COURT OPINION 1a
DISTRICT COURT ORDER 3a

TABLE OF AUTHORITIES

Kelly v. Neubert, 898 F.2d 15 (3rd Cir. 1990) 11

North Carolina v. Pearce, 395 U.S. 711 (1969) 8,9,10

Sexton v. Kemna, 278 F.3d 808, 816-817 (8th Cir. 2002) 13

Texas v. McCullough, 475 U.S. 134 (1986) 10

United States v. Arrington, 255 F.3d 637 (8th Cir. 2002), *cert. denied*, ___ U.S.___, 122 S.Ct. 634 (2002) 11

United States v. Bay, 820 F.2d 1511 (9th Cir. 1987) 11

United States v. Campbell, 106 F.3d 64 (5th Cir. 1997) .. 8

United States v. Edwards, 225 F.3d 991 (8th Cir. 2000), *cert. denied*, 531 U.S. 1100 (2001) 11

United States v. Fortier, 242 F.3d 1224 (10th Cir.), *cert. denied*, ___U.S. ___, 122 S.Ct. 409 (2001) 11

United States v. Garcia-Guizar, 234 F.3d 483 (9th Cir. 2000), *cert. denied*, 532 U.S. 984 (2001) 11

United States v. Goodwin, 457 U.S. 368 10,14

United States v. Gray, 852 F.2d 136 (4th Cir. 1988) 11

United States v. Henry, 709 F.2d 298 (5th Cir. 1983) 9

United States v. Loe, 248 F.3d 449, 454 (5th Cir.), *cert. denied*, ___U.S.___, 122 S.Ct. 397 (2001) 2,6

United States v. Mancari, 914 F.2d 1014(7th Cir. 1990) 11

United States v. Markus, 603 F.2d 409 (2nd Cir. 1979) 12

United States v. Monaco, 702 F.2d 860 (11th Cir. 1983)12

United States v. Morris, 116 F.3d 501 (D.C. Cir. 1997) *cert. denied*, 522 U.S. 975 (1997)..... 11

United States v. Murray, 144 F.3d 270 (3rd Cir. 1998) *cert. denied*, 525 U.S. 911 (2000)..... 10

United States v. Pimienta-Redondo, 874 F.2d 9, 15 (1st Cir.)(en banc)(plurality), *cert. denied*, 493 U.S. 890 (1989)..... 11

United States v. Rodgers, 278 F.3d 599 (6th Cir. 2002), *cert. denied*, ___U.S.___, 122 S.Ct. 1337 (2002)..... 11

United States v. Ruiz-Alvarez, 211 F.3d 1181 (9th Cir. 2000), *cert. denied*, 531 U.S. 936 (2000)..... 11

United States v. Sanders, 197 F.3d 568 (1st Cir. 1999), *cert. denied*, 530 U.S. 1238 (2000)..... 10

United States v. Schoenhoff, 919 F.2d 936 (5th Cir. 1990) 9

United States v. Sullivan, 967 F.2d 370, 374 (10th Cir. 1992)..... 11

United States v. Vontsteen, 950 F.2d 1086 (5th Cir. 1992) 10

Wasman v. United States, 468 U.S. 559 (1984).... 9, 10, 14

Petitioner Loe's Highport, Inc. respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on October 2, 2002, to address the important question of federal law presented herein, and to resolve the conflict among the federal Courts of Appeals on this question.

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit which gives rise to this petition is *United States of America v. Loe's Highport, Inc.*(#02-40091, dated October 2, 2002), which is not reported. A copy of the opinion is attached to this petition as Appendix A. The judgment and commitment order of the United States District Court for the Eastern District of Texas re-sentencing Loe's Highport, Inc. to five (5) years probation, and fining it $4,000,000.00, is not reported. A copy of the judgment and commitment order is attached to this petition as Appendix B.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

On March 4, 1999, after two separate trials by jury in the United States District Court for the Eastern District of Texas, Loe's Highport, Inc. (LHI) was sentenced on the 19 separate felony counts (money laundering, wire fraud, and mail fraud) of which it had been convicted. The district court placed LHI on five (5) years probation, and fined it $4,000,000, to be divided equally among the nineteen (19) counts of conviction. LHI was also ordered to pay restitution.

Thereafter, LHI timely appealed to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals reversed LHI's money laundering convictions on three counts, based on the insufficiency of the evidence regarding those counts. *See United States v. Loe*, 248 F.3d 449, 454 (5th Cir.), *cert. denied*, ___U.S.___, 122 S.Ct. 397 (2001). LHI's convictions on all other counts were affirmed, and the Court of Appeals remanded the matter to the district court for resentencing.

LHI was re-sentenced on December 19, 2001. The district court imposed the same orders of restitution, it ordered LHI to pay the same costs of prosecution, it vacated the forfeitures on the three vacated money laundering counts, and it reduced the special assessments by $600. However, the district court imposed the same fine as had been imposed at the first sentencing: $4,000,000.00.

Thereafter, LHI filed its second appeal. On October 2, 2002, the Court of Appeals handed down its opinion affirming the sentence of the district court. No petition for rehearing was filed. In accordance with Supreme Court Rule 13.3, this petition has been filed within ninety (90) days of the date of the judgment of the Court of Appeals. Accordingly, this Court has jurisdiction over this matter pursuant to Title 28, United States Code, Section 1254(1). See Supreme Court Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

1. INTRODUCTION

When the Court of Appeals handed down its opinion in LHI's first appeal on April 17, 2001, reversing three of the counts of money laundering of which LHI had been convicted, that opinion created an expectation on the part of LHI that the fines of $631,578.90 that had been imposed upon those reversed counts would be returned.[1] Had LHI been convicted and sentenced in the Second or Eleventh Circuit, that expectation would have been fulfilled, because that is the law in those circuits. Because it was convicted in the Fifth Circuit, however, LHI discovered it faced the distinct possibility that the district court would re-impose its original sentence, even though the number of counts of conviction had been reduced.

This is precisely what occurred. When LHI was resentenced on December 19, 2001, it was again fined $4,000,000.00. So, instead of being required to return to LHI in excess of $600,000.00 in fines, the Government was called upon to return $600.00 in special assessments.

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[1] The district court divided the $4,000,000.00 fine equally among the 19 counts of conviction, for a fine of $210,526.30 per count. Between sentencing, and the conclusion of the appeal, LHI satisfied all of the financial obligations created by the judgment and commitment order, reserving all its rights under the appeal.

As discussed below, the sentence a defendant might receive on resentencing has become function of geography – not due process. In the Second and Eleventh Circuits, resentencing is governed by the "remainder aggregate" or count by count approach, which would not permit the result in this case. In the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits, an "aggregate package" approach is used. Review by this Court is certainly appropriate to address this conflict among the circuits.

More importantly, review by this Court is appropriate to address the important due process questions that are created by the tensions between the sentencing guidelines, notions of "relevant conduct," statutory penalties, and 'partially sucessful' appeals. If, on remand for resentencing, the same sentence can be imposed upon a defendant who has been only partially successful in his or her appeal, then for all practical purposes, the appeal was an exercise in futility for the defendant, and an academic exercise for the court of appeals – because the ultimate outcome for the defendant remains unchanged. This absurd result could not have been contemplated by the drafters of either the bill of rights, or the sentencing guidelines.

This petition presents the Court with the opportunity to redress an issue that has become commonplace, because it arises in every 'partially successful' appeal by a criminal defendant.

2. THE SPECIFIC FACTS OF THIS PROCEEDING

On September 11, 1997, a federal grand jury sitting in the Eastern District of Texas, Sherman

Division, returned a thirty-two (32) count indictment against Babo Beazley Loe, Cornelius DeWitte Loe, Jr., a/k/a/ C.D. Loe, Jr., Henry Blume Loe, Loe's Highport, Inc., (hereinafter LHI) Andrew Scott Howard, and Roger Benton Foltz. (Each defendant was not named in every count of the indictment). The indictment alleged, *inter alia*, ten violations of the money laundering statute (18 U.S.C. §1957). In addition, the indictment sought the forfeiture of certain property.[2]

In response to certain defense motions, the district court determined that Counts 17, 22, 23, 24, 25, 29, 30 and 31 would be tried separately. The trial of defendants Babo Loe, C.D. Loe, LHI, Howard, and Foltz on Counts 17, 22, 23, 24, 25, 29, 30 and 31 began on July 6, 1998. On August 5, defendants Babo Loe, C.D. Loe, and LHI were found guilty on all counts in which they were named. Defendants Howard and Foltz were found not guilty. Because the three defendants who were found guilty were also defendants in some of the counts that remained to be tried, sentencing was deferred until after the second trial.

The second trial began on September 14, 1998. On November 11, 1998, LHI was found guilty on Counts 1,2,3,4,5,7,8,9,10,18, and 19. Babo Loe, C.D. Loe, Jr., and LHI were sentenced on March 4, 1999. Defendant LHI was placed on five (5) years probation, **fined $4,000,000, to be divided equally among the nineteen (19) counts of conviction**; ordered to pay restitution to the IRS in the sum of $1,602,905.56; ordered to pay restitution to the other victims

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[2] On April 9, 1998, a thirty-one (31) count superseding indictment was returned, which was substantially identical to the original indictment, save for certain modifications to the money laundering counts, including the elimination of one count.

(Lexington and Chubb insurance companies, Marine Office of America Corporation, and the Army Corps of Engineers) in the amount of $1,735,130.11; ordered to pay costs of prosecution in the amount of $74,354.21, and ordered to pay a special assessment of $3,800. Thereafter LHI timely filed its notice of appeal.

Subsequently, LHI sold its principal asset, a marina. Out of the proceeds of that sale, it paid the fines, the restitution, the forfeitures, and the special assessments that had been imposed by the district court, with full reservation of its rights under the appeal that had been taken to the Fifth Circuit.

On appeal, the Court of Appeals reversed LHI's money laundering convictions on counts 22, 23 and 24, on the grounds that "[n]o reasonable juror could conclude that these money laundering convictions were warranted beyond a reasonable doubt." *United States v. Loe*, 248 F.3d 449, 467 (5th Cir. 2001). The Court affirmed LHI's other convictions, and remanded the matter to the district court for resentencing. *United States v. Loe*, at 470.

Prior to resentencing, counsel for defendant LHI submitted a "Sentencing Memorandum" to the district court, addressing the available sentencing possibilities. In that memorandum, LHI contended that because the Court of Appeals had vacated the convictions on counts 22, 23, and 24, the following was required: (1) the special assessments imposed upon LHI for those counts must be returned; (2) the forfeitures (of cash) entered with regard to those counts must be vacated, and returned; and (3) tne fines imposed upon those counts ($210,526.30 per count) must be returned.

LHI was sentenced on December 19, 2001. The

district court imposed the same orders of restitution, it ordered LHI to pay the costs of prosecution in the same amount as had been previously ordered, it vacated the forfeitures on counts 22, 23, and 24, and it reduced the special assessments by $600. However, the district court imposed the same fine as had been imposed at the first sentencing: $4,000,000.

In imposing this sentence, the district court gave the following explanation:

> The Court made a downward departure in the case of the – a fine of the corporation because the Court had imposed the maximum fines that could be imposed of Mrs. Loe. I had a reason for doing that at the time. I think the record reflects the reason. But that, what I consider to be a valid reason for downward departure is partially no longer in existence.
>
> So it's going to be the judgment of the Court that the Defendant, Loe's Highport, Inc., pay to the United States a total fine of $4,000,000 which is the amount of the original fine, consisting of $250,000 per count. And I impose that because I just don't think that the just – the full justification for the downward departure that formerly existed any longer exists.

Counsel for LHI objected to the sentence, on the grounds that: (1) it violated the procedural and substantive due process clauses of the 5th Amendment; (2) it violated the excessive fines clause of the 8th Amendment; (3) it was vindictive, under *North Carolina v. Pearce*; and (4) it was not consistent with the mandate

of the Court of Appeals.

On appeal to the Fifth Circuit, LHI argued that the sentence imposed by the district court was presumptively vindictive, because the same sentence, and fine had been imposed upon fewer counts of conviction, resulting in a higher per count fine. In an unpublished *per curiam* opinion, found at Appendix A, the Court of Appeals rejected LHI's argument:

> The Supreme Court held in North Carolin v. Pearce, 395 U.S. 711 (1969), that the Due Process Clause forbids the imposition of a more severe sentence upon resentencing after an appellate reversal because of the possibility of judicial vindictiveness. Under the "aggregate package" approach adopted by this court in United States v. Campbell, 106 F. 3d 64, 66 (5th Cir. 1997), the fine LHI received on remand is not more severe than the original sentence, and therefore, is not vindictive. LHI's argument that this court should deviate from the "aggregate package" approach is without merit.

Hence, this petition.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT, AND IN A WAY WHICH IS IN CONFLICT WITH TWO OTHER CIRCUIT COURTS OF APPEALS.

In *North Carolina v. Pearce*, 395 U.S. 711, 723-25, 89 S.Ct. 2072, 2080 (1969), this Court held that the due process clause of the Fourteenth Amendment to the United States Constitution is implicated when a more severe sentence is given to a defendant upon resentencing, because of the possibility of judicial vindictiveness.[3] As might be expected, the due process clause of the Fifth Amendment affords identical protection against such vindictiveness. *Wasman v. United States*, 468 U.S. 559 (1984).

To determine whether a second sentence is vindictive, as that term is defined by *Pearce*, a two-step analysis is employed. The first step is to determine whether the second sentence imposed is in fact more severe than the first sentence given to a defendant, prior to his or her successful appeal. *United States v. Schoenhoff*, 919 F.2d 936, 939 (5th Cir. 1990); *United States v. Henry*, 709 F.2d 298, 315 (5th Cir. 1983); and *United States v. Vontsteen*, 950 F.2d 1086, 1092 (5th Cir. 1992). If it is determined that a harsher penalty has been imposed on resentencing, vindictiveness is

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[3] Although *Pearce* addressed resentencing after a second trial, the rule it established has been held to apply to cases remanded solely for resentencing. *United States v. Vontsteen*, 950 F.2d 1086, 1089 n.2 (5th Cir. 1992) (citations omitted).

presumed. *Pearce, supra*, 395 U.S. at 726, *United States v. Goodwin*, 457 U.S. 368, 374 (1982).

Once vindictiveness is presumed, a more severe sentence will be vacated on appeal, unless the district court rebuts the presumption. As this Court wrote in *Pearce*: "[i]n order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." *Pearce, supra*, 395 U.S. at 726. This second step must be satisfied in order to overcome the presumption of vindictiveness. *Goodwin, supra*, 457 U.S. at 374; *see also Texas v. McCullough*, 475 U.S. 134, 137-38 (1986) quoting *Pearce, supra*, 395 U.S. at 725-26; *Wasman, supra*, 468 U.S. at 564-65 (same).

As this case illustrates, the problem arises in the first step: how does a court make the determination of whether a second sentence is in fact more severe than the first? Although at first glance the analysis would appear to be a simple one, multi-count indictments, a plethora of sentencing options, and the sentencing guidelines have made the determination far more difficult than it was in 1969, the year *Pearce* was handed down.

Compounding the problem is the absence of any statement from this Court on how the determination should be made – although the Court has been asked repeatedly to provide such guidance. *See United States v. Sanders*, 197 F.3d 568 (1st Cir. 1999), *cert. denied*, 530 U.S. 1238 (2000), *United States v. Murray*, 144 F.3d 270 (3rd Cir. 1998), *cert. denied*, 525 U.S. 911 (2000), *United States v. Rodgers*, 278 F.3d 599 (6th Cir. 2002), *cert. denied*, ___U.S.___, 122 S.Ct. 1337 (2002), *United States v. Arrington*, 255 F.3d 637 (8th Cir. 2002), *cert. denied*,

___ U.S.___, 122 S.Ct. 634 (2002), *United States v. Edwards*, 225 F.3d 991 (8th Cir. 2000), *cert. denied*, 531 U.S. 1100 (2001), *United States v. Garcia-Guizar*, 234 F.3d 483 (9th Cir. 2000), *cert. denied*, 532 U.S. 984 (2001), *United States v. Ruiz-Alvarez*, 211 F.3d 1181 (9th Cir. 2000), *cert. denied*, 531 U.S. 936 (2000), *United States v. Fortier*, 242 F.3d 1224 (10th Cir. 2001), *cert. denied*, ___U.S. ___, 122 S.Ct. 409 (2001), and *United States v. Morris*, 116 F.3d 501 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 975 (1997).

Not surprisingly, given the complex sentencing situations presented by multi-count indictments, and the frequency of appeals in which relief is less than total, the Circuits have "split" on the methodology to be used. As the Court of Appeals for the Fifth Circuit explained in *United States v. Campbell*, 106 F.3d 64, 67-68 (5th Cir. 1997), there are now two separate and distinct approaches to determining whether a second sentence is in fact more severe than the first: (1) the "aggregate package" approach; and (2) the "remainder aggregate approach."

Under the aggregate package approach, which has been adopted by the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits,[4] an appellate court compares the total original sentence to the total sentence after resentencing. If the total after

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[4] *See United States v. Pimienta-Redondo*, 874 F.2d 9, 15 (1st Cir.)(en banc)(plurality), *cert. denied*, 493 U.S. 890 (1989); *Kelly v. Neubert*, 898 F.2d 15, 16, (3rd Cir. 1990); *United States v. Gray*, 852 F.2d 136, 138 (4th Cir. 1988); *United States v. Campbell*, 106 F.3d 64, 68 (5th Cir. 1997); *United States v. Mancari*, 914 F.2d 1014, 1021-22 (7th Cir. 1990); *Sexton v. Kemna*, 278 F.3d 808, 816-817 (8th Cir. 2002); *United States v. Bay*, 820 F.2d 1511, 1513 (9th Cir. 1987); *United States v. Sullivan*, 967 F.2d 370, 374 (10th Cir. 1992).

resentencing is greater, then a presumption of vindictiveness arises. Under the "remainder aggregate" or "count-by-count" approach, which is employed by the Second and Eleventh Circuits,[5] an appellate court compares the district court's aggregate sentence on the nonreversed counts after appeal with the original sentence imposed on those same counts before appeal. If the new sentence on the remaining counts exceeds the original sentence on those counts, the *Pearce* presumption of vindictiveness attaches.

The problem with having two different approaches is that they produce different results. As the Fifth Circuit's opinion in this case makes clear, under an aggregate package approach, it is perfectly acceptable to impose the same fine upon resentencing, even if that same fine is being imposed on fewer counts of conviction – thereby effectively raising the fine originally imposed on the counts that were affirmed on appeal. Had the district court in this case employed the remainder aggregate approach, it could not have re-imposed the same fine, but would have instead been required to reduce the fine by $631,578.90.

Such inconsistencies do not comport with due process of law. This Court should grant *certiorari* to resolve this conflict among the circuits.

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[5] *See United States v. Markus*, 603 F.2d 409, 413 (2nd Cir. 1979); *United States v. Monaco*, 702 F.2d 860, 885 (11th Cir. 1983).

II. THE DUE PROCESS ISSUE IN THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW

Although the "aggregate package" approach has been adopted by most circuits, it is not without its drawbacks, or, in the words of Judge Arnold of the Eighth Circuit, in his dissenting opinion in in *Sexton v. Kemna*, 278 F.3d 808, 816-817 (8th Cir. 2002), its "manifold problems":

> Today, the Court instead adopts the "aggregate sentence" approach of simply comparing the first and second sentences. The problems with this approach are manifold. First, it allows a judge to order the same sentence regardless of any reduction in the defendant's convictions, provided that the statutory maximums for the convicted crimes are not exceeded. This results in defendants being given no "credit" for having been convicted of fewer offenses. They receive the same sentence despite fewer convictions. * * * This is precisely the type of result that chills appeals by criminal defendants who may believe that the increased sentence after retrial results from judicial vindictiveness. The prophylactic rule in *Peace* forbidding more severe sentences was designed to remove this doubt. Upholding the same sentence for a defendant who was convicted of fewer crimes does nothing to eliminate this fear. Instead, it informs defendants that whether they are convicted or acquitted of a crime (for which they were originally

> sentenced to prison time) may now be irrelevant to their new sentence. * * *

Id.

In short, the majority approach appears to run contrary to the reasons underlying the prophylactic rule created by *Pearce*. As the Court noted in *Goodwin*, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *Goodwin, supra*, 457 U.S. at 372 (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 363, (1978)). Put most simply, due process requires that a defendant be "freed of apprehension ... of retaliatory motivation on the part of the sentencing judge," because of the chilling effect that it may have on the defendant's decision to appeal. *Id.* at 372-73; *Wasman v. United States*, 468 U.S. 559, 564 (1984). Arguably, due process also requires that a 'partially successful appeal' not be an act of complete futility. However, in the eight circuits that use the aggregate package approach, that is not just a possibility, it is often the reality. This Court should grant *certiorari* to address this important federal question.

CONCLUSION

Wherefore, the foregoing reasons considered, this Court is respectfully urged to grant LHI's petition for a writ of certiorari.

New Orleans, Louisiana, this 24th day of December, 2002.

Respectfully submitted,

HERBERT V. LARSON, JR.
Counsel of Record
700 Camp Street
New Orleans, Louisiana 70130
(504) 528-9500
Attorney for Petitioner
Loe's Highport, Inc.

(Any footnotes trail the end of each document.)
No. 02-40091

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

LOE'S HIGHPORT, INC.,
Defendant – Appellant.

Filed October 2, 2002

Appeal from the United States District Court for the
Eastern District of Texas
USDC No. 4:97 – CR – 71 – 4

Before KING, Chief Judge, and SMITH and DENNIS, Circuit Judges.
PER CURIAM:*

Loe's Highport, Inc., (LHI) appeals the $4,000,000 fine it received on remand after this court reversed three counts of conviction for money laundering. See United States v. Loe, 248 F.3d 449, 454 (5th Cir.) cert. denied, 122 S. Ct. 397 (2001). LHI argues that, although the amount of the fine was the same as the original fine, it was a harsher sentence because it was divided among fewer counts, and therefore, vindictive.

The Supreme Court held in North Carolina v. Pearce 395 U.S. 711 (1969), that the Due Process Clause forbids the imposition of a more severe sentence upon resentencing after an appellate reversal because of the possibility

judicial vindictiveness. Under the "aggregate package" approach adopted by this court in United States v. Campbell, 106 F.3d 64, 66 (5th Cir. 1997), the fine LHI received on remand is not more severe than the original sentence, and therefore, is not vindictive. LHI's argument that this court should deviate from the "aggregate package" approach is without merit.

The sentence on remand is AFFIRMED.

Footnotes

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Case Number: 4:97CR00071-004

UNITED STATES OF AMERICA

v.

LOE'S HIGHPORT INC.

AMENDED JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Herbert Larson / Jay Ethington

Date of Original Judgment:03/04/1999 (or Date of Last Amended Judgment

Reason for Amendment:

X Correction of Sentence on Remand (Fed R. Crim. p 35(a))

THE DEFENDANT:

X was found guilty on count(s) *1,2-5,7-10,11-19,25 and 29-31 of the Superseding Indictment after a plea of not guilty.

Accordingly, the Court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 371	Conspiracy to Defraud the United States	07/08/1996	1
18 U.S.C. § 1001	False Statement to a United States Agency	09/14/1995	2-5
26 U.S.C. § 7206 (1)	False Statement on Income Tax Return	07/20/1994	7-10

The Additional Counts of Conviction - Page 2

The defendant is sentenced as provided in pages 2 through 1 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) * 20,24 and 26 28 of the Superseding Indictment.

12/1912001

Paul Brown
United States District Judge

Date: January 24, 2002

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 371	Conspiracy to Commit Mail and Wire Fraud	04/09/1998	17 and 18
18 U.S.C. § 1341	Mail Fraud	09/30/1994	19
18 U.S.C. § 1957	Engaging in Monetary Transactions In Property Derived From Specified Unlawful Activity	06/21/1995	25 & 29-31

PROBATION

The defendant is hereby placed on probation for a term of 5 years on each count, all such terms to run concurrently.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shell refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and

at least two periodic drug tests thereafter, as directed by the probation officer.

X The defendant shall not possess a firearm, destructive device, or any other dangerous weapon, as defined in 18 U.S.C. § 3563(b)(8).

If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities:
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol:

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered:

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide the probation officer with any requested financial information as necessary to monitor its attempt to pay the fine. The company shall make periodic submissions to the probation officer, as requested, reporting on the company's financial condition and results of business operations, and accounting for the disposition of all funds received.

The corporation shall submit to a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by a monitor appointed by the court, and interrogation of knowledgeable individuals within the organization. This monitor shall be compensated by the corporation for its court ordered services.

The corporation shall be required to notify the Court or probation officer immediately upon learning of any material adverse change in its business or financial condition or prospects.

The defendant shall be prohibited from discharging any financial penalty imposed through any present or future bankruptcy proceedings.

The defendant shall pay restitution totaling $1,602,905.56 to the internal Revenue Service in the amount Listed in the "Victim Impact" section of the presentence report. All restitution is payable by cashier's check or money order made out the United States District Court and forwarded to the Fine and Restitution Section, U.S. Courts, P.O. Box 570, Tyler, Texas 75710. This restitution shall be paid in monthly installments of $30,000 to commence 30 days after the date of this judgment with the total being due on January 1, 2000 or until the marina be been transferred red or is no longer operated by Loe's Highport Inc., which ever comes first.

The defendant shall be jointly and severally liable with Babo Beazley Loe, 4:97er71(01) for the cost of prosecution in the total amount of $74,354,21.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals	$ 3,200.00	$4,000,000.00	$ 1,735,130.11

RESTITUTION

X The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(l), all nonfederal victims must be paid in full prior to the United Stales receiving payment.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
United States Army Corps of Engineers - Tulsa District	$229,981.00	$229,981.00	
Lexington Insurance Company	$997,658.00	$997,658.00	
Chubb Insurance	$507,491.11	$507,491.11	

Company Totals	$1,735,130.11	$1,735,130.11

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

X in full immediately

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary penalty payments are to be made to the US District Court, % Fine & Restitution Section P.O. Box 570, Tyler, TX 75710, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

Fine shall he paid in monthly installments of $75,000 beginning 30 days of this judgment until 1/1/2000 or until marina has been transfered/sold, which ever comes first.

Joint and Several Case Number (including Defendant Number)	Defendant Name	Joint and Several Amount
4:97CR71(1)	Babo Beazley Loe For Costs of Prosecution	$74,354.21
4:97CR71(1)	Babo Beazley Loe Restitution for Loss	$1,735,130.11
4:97CR71(2)	C.D. Loe, Jr. Restitution for Loss	$1,505,149.11

X The defendant shall pay the cost of prosecution.

X The defendant shall forfeit the defendant's interest in the following property to the United States:
See Additional Forfeited Property - Page 7

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States Attorney.

ADDITIONAL FORFEITED PROPERTY

Forfeiture is ordered pursuant to Fed. R. Crim. P. 32(d)(2) in the Court's Preliminary Order of Forfeiture entered April 14, 1999, except that forfeiture ordered for counts 22, 23, and 24 should be eliminated. Defendants Babo Beazley Loe and Loe's Highport, Inc. should be

refunded by the United States the amount of forfeiture paid on these counts. This payment shall be made payable to the party from which the money came.